SUPREME COURT, U.S.
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MICHAEL RODAK, JR., CLERK

NO. 80-116

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

MATTER OF ANGELO DARRIGO,
Petitioner-Appellant,

-against-

STATE COMMISSION ON JUDICIAL CONDUCT, the HON. MRS. GENE ROBB, CHAIRPERSON, the HON. GERALD STERN, ADMINISTRATOR, and the HON. FRANCIS L. VALENTE, JR., REFEREE, and THE SEVERAL OTHER MEMBERS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT AS IT CURRENTLY EXISTS PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW YORK, ART. 6, SECT. 22, AND THE JUDICIARY LAW OF THE STATE OF NEW YORK, SECTS. 40-48,
Respondents-Appellees.

On Appeal from Appellate Division, Supreme Court of New York, First Judicial Department

A BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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PRELIMINARY STATEMENT

This brief is submitted in opposition to the Respondents-Appellees motion to dismiss the appeal. It is

submitted that this Court has jurisdiction to hear and decide this appeal because the State Courts resolved the Petitioner's Article 78 proceeding on Federal Constitutional grounds. (Jur. St. 6a-7a).[1]

JURISDICTION

The Respondents-Appellees seek dismissal of this appeal claiming that the order appealed from was not necessarily based upon a federal ground. It is submitted that from the very inception of the Special Proceeding in the State Courts the Appellant sought a declaration that the subject legislation was unconstitutional by reason by the First, Fifth, Sixth and Fourteenth Amendments (Jur. St. 4a). It was upon those very specific grounds that the Justice at Trial Term ruled as is set forth in his opinion (Jur. St. 6a-7a). In addition, in order to hold this legislation to be constitutional Special Term relied upon decisions of this Court.

In their attempt to obtain a dismissal of this appeal the argument is pressed that the unanimous affirmance of the Appellate Division, First Department "may have" reflected a determination by that Court that the Federal Constitutional claims asserted were inappropriate or prematurely raised. (See p. 3 of motion to dismiss). The Court affirmed Special Term.

The argument of inappropriateness of the Special Proceeding in order to obtain a determination of unconstitutionality has been constantly made by the Respondents-Appellees. However, the law in New York is clear that a C.P.L.R. Article 78 Proceeding is an appropriate vehicle to attack the constitutionality of a statute. This principle was recently reaffirmed in *Watergate II Apartments v. Buffalo Sewer Authority* (46

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1. Designation "Jur. St." refers to pages of the Jurisdictional Statement.

NY2d 52) where the Court pointed out that while it is Hornbook law that one who objects to an act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a Court of Law, that is an inflexible rule and an agency can be challenged as being unconstitutional. (Id. 57) The Court at Special Term in reaching and deciding the constitutional questions presented relied upon that case.

This is a real controversy and it is the constitutionality or unconstitutionality of this legislation which will determine the fate of the Petitioner-Appellant. The legislation as pointed out in the jurisdictional statement is patently unconstitutional. The claims made by the Respondents-Appellees that this Court has in the past reviewed the questions presented and upheld the procedures which are attacked is an outright misstatement. In their motion to dismiss at page 14, it is claimed that "It should be noted that this Court has twice in the past considered constitutional challenges to the combination of functions of the former Court on the Judiciary." The cases of *Friedman v. The Court on the Judiciary* (375 US 10) and *Friedman v. The State of New York* (24 NY2d 528, app. dism. 397 US 317) are cited in support of that statement. The Respondents-Appellees failed to emphasize to this Court that the Court on the Judiciary which previously existed in New York has been done away with and all of the powers of that Court have now been incorporated and given to this Commission which can remove any Judge or Justice of the State of New York. It is the very reasoning which caused the Court of New York State to uphold the constitutionality of the former Court on the Judiciary which demonstrates that the current New York State Commission on Judicial Conduct consists of a combination of functions which is violative of due process.

In *Friedman v. The State of New York* (24 NY2d 528, app. dism., 397 US 317) a New York State Supreme Court

Justice argued that because the then existing Court on the Judiciary acted as complainant, prosecutor and Judge his rights to due process of law had been violated. In that case, the Respondent, Friedman, relied on this Court's case of *Matter of Murchison* (349 US 133). Obviously, after carefully looking to the law as set forth in *Murchison,* the New York State Court of Appeals upheld the existence of the former Court on the Judiciary pointing out that the Court on the Judiciary did not provide a procedure such as was condemned in *Murchison.* The doctrinal differences are clear. It was pointed out in *Friedman* that the right of cross examination was not lost because no member of the Court on the Judiciary could be called as a witness, for the members of that Court acted as Judges and not investigators. Under the current New York State Commission on Judicial Conduct the members of the Commission act as investigators and thus cross examination is lost. (See, *Matter of Richardson,* 247 NY 401 [Cardoza, Ch. J.]). A second ground used by the New York State Court of Appeals in *Friedman* to sustain the former Court on the Judiciary was to point out that "here the Court on the Judiciary was not the accusor, for it was the report of the Supreme Court Justice which served as the complaint." (p. 543) Under the current law the New York State Commission on Judicial Conduct is in fact the accusor, thus that distinction no longer exists. Furthermore, the New York State Court of Appeals in *Friedman* pointed out that the Court on the Judiciary could not be said to have had an interest in the outcome of a case before it because it "reviewed" the allegations in a complaint to ascertain whether or not a demurrer was in order. Once again, this distinction is no longer there, for the New York State Commission on Judicial Conduct is the entity that directs charges to be filed and does not merely review charges to determine whether or not they are sufficient in law. The Commission does in fact prejudge facts and does

not just look to see if certain factual contentions make out a *prima facie* charge. It was further pointed out in *Friedman* that formal charges are preferred by a complainant designated by the Court on the Judiciary, but that it could not be assumed that because the Court designated the attorneys to conduct the proceedings that that Court became so intimately as to deprive a party before it of an impartial tribunal.

Under the current composition of the New York State Commission on Judicial Conduct it is the entity which investigates, prefers charges, determines fact, determines law and imposes the penalty. The Administrator is not an independent man but one who serves at the will of the Commission. When the New York State Commission on Judicial Conduct is challenged the Administrator goes to Court on its behalf to defend all of its actions. It is indeed significant that the Administrator is appearing before this Court to uphold the existence of this Commission and that the Attorney General of the State of New York has declined to intervene. This entity and its Administrator are inextricably intertwined and their sole interest is in justifying any acts taken. The New York State Commission on Judicial Conduct is interested in the Administrator and the Administrator is interested in them.

In *Marshall v. Jerrico, Inc.* (__US__, 100 Sup. Ct. 1610) this Court recently reviewed the procedures provided for by the Fair Labor Standards Act concerning the collection of civil penalties and pointed out that indeed, justice must satisfy the appearance of justice. This Court did not follow, in that case, the actual bias standard applicable to Administrative hearings. It is submitted that the actual bias standard relied upon by the Respondents-Appellees is not the standard under which the New York State Commission on Judicial Conduct can exist. When this Commission exercises its disciplinary function it does not follow the standard it claims to this Court that it

should be held to. In *Matter of Walter C. Dunbar,* (N.Y.L.J., 8-2-79, p. 5 [Commission on Judicial Conduct]) the Commission on Judicial Conduct sustained certain charges against a Town Justice pointing out:

> "With respect to Charge 6 of the Formal Written Complaint, involving People v. Marty Butler and People v. Keith Paddock, respondent presided over both matters despite his participation in preparing the prosecution's case in both matters, and despite his admittedly being 'upset' by the pre-trial conduct of one of the defendants. By so presiding over these matters, respondent violated Section 33.3 (c)(1)(i) of the Rules Governing Judicial Conduct, which requires a judge to 'disqualify' himself in a proceeding in which his impartiality might reasonably be questioned, including . . . instances where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.' "

The real question presented by this appeal is whether or not this Court will hold that Judges and Justices subjected to disciplinary proceedings are entitled to appear before a forum which fails to comply with substantive and procedural due process requirements. It is clear that the New York State Commission on Judicial Conduct as currently constituted does not afford the process due to the Judges and Justices of the State of New York. It is a Commission which has engaged in outrageous tactics and has taken away the independence of Judges and Justices in this State. Nothing can be more telling of the manner in which it actually functions than is indicated in the *Monitoring* function set forth at pp. 18 through 21 of the Jurisdictional Statement.

The fact that after a penalty has been imposed a review may be sought to the New York State Court of Appeals does not eradicate the unconstitutional proceedings

to which a Judge or Justice has been subjected. Certainly, the Petitioner-Appellant's claim concerning the lack of due process could not be raised before the New York State Commission on Judicial Conduct. That Commission is not a Court and could not declare the legislation unconstitutional. It would be inappropriate for the Petitioner-Appellant to have raised his constitutional challenges to the New York State Commission on Judicial Conduct. These constitutional challenges not having been raised before the New York State Commission on Judicial Conduct would not have been preserved for review by the New York State Court of Appeals. The only procedural mechanism provided for challenging the constitutional existence of the New York State Commission on Judicial Conduct was by the within C.P.L.R. Article 78 Proceeding. The fact that all of the Appellate Courts in the State of New York have refused to decide this issue does not mean that this Court lacks jurisdiction over the question. The constitutional questions presented were raised in appropriate form and those questions were presented to all of the Courts in the State of New York. This case is now ripe for this Court to review the issues. (*Warth v. Seldin,* 422 US 490, 498-499; *Baker v. Carr,* 369 US 186, 204; *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 US 26, 38).

As its footnote in page 20, the appellees state: "Moreover, no hearing is ever contemplated from which such information might be 'excluded' in the future." This statement is an outright lie. The Commission subsequent to the filing of this motion, served the appellant with those charges, which a hearing is scheduled to take place on, before a member of the Commission, on November 5, 1980. Such misstatements to this court are outrageous, but apparently standard.

CONCLUSION

THIS MATTER SHOULD BE SET DOWN FOR BRIEFING AND ORAL ARGUMENT.

Respectfully submitted,

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